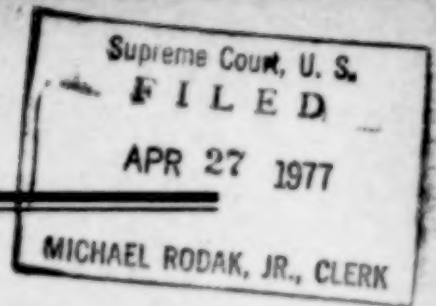


No.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

76-1491

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Petitioner Anthony M. Natelli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the denial of his motion for relief pursuant to 28 U.S.C. §2255.

OPINIONS BELOW

The opinions of the court of appeals and of the district court denying relief under 28 U.S.C. §2255 are set forth in Appendices A and C, respectively. Those

opinions are not yet reported. The opinion of the court of appeals affirming petitioner's conviction, set forth in Appendix D of this petition, is reported at 527 F.2d 311 (2d Cir. 1975).¹

JURISDICTION

The judgment of the court of appeals affirming the denial of petitioner's §2255 motion was entered on March 28, 1977. No petition for rehearing has been filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of 28 U.S.C. §2255 and section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, are set forth in Appendix G, *infra*.

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that, absent an intervening change of law, a collateral proceeding under 28 U.S.C. §2255 is barred once the issue raised has been decided adversely to the defendant on direct appeal.

2. Whether the court of appeals erred in affirming the denial of petitioner's §2255 motion by relying on

¹This Court denied a petition for writ of certiorari, No. 75-808, seeking review of that decision. 425 U.S. 934 (1976).

its assessment of credibility, where the district court had failed to hold a hearing on the issues.

STATEMENT

A. Introduction

This case presents important questions concerning the availability of collateral relief under 28 U.S.C. §2255. Petitioner, a certified public accountant, was convicted of a single count charging him with willfully and knowingly submitting a materially false financial statement to the SEC in violation of section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff. Following petitioner's unsuccessful efforts to obtain relief on direct appeal, he moved in the district court for a new trial pursuant to Fed. R. Crim. P. 33 or, in the alternative, for relief pursuant to 28 U.S.C. §2255 on the grounds that (1) the government failed to prove an essential element of the offense (the falsity of the statement) and (2) critical factual assertions made by the prosecutor at petitioner's trial were erroneous.

The district court denied petitioner's motion without holding an evidentiary hearing. In affirming the district court, the court of appeals did not reach the merits of the first issue presented because it held that collateral relief under §2255 is barred whenever the issue raised has been litigated on direct appeal and there has been no intervening change of law. This determination conflicts with previous decisions of this Court and places an unjustifiable restriction on the availability of habeas corpus to protect against fundamental defects in the truth-finding process. The court of appeals also

affirmed the district court on the second issue even though, in violation of the explicit command of §2255, there had been neither an evidentiary hearing in the district court nor a finding—which could not have been made—that the files and records of the case conclusively showed that petitioner was entitled to no relief.

B. The Offense Charged And The Proceedings At Trial.

In an indictment returned in the United States District Court for the Southern District of New York, petitioner Anthony M. Natelli, then a partner in the international accounting firm of Peat, Marwick, Mitchell & Co. (PMM), was charged together with a PMM accountant working under petitioner's general direction (Joseph Scansaroli) and five officers of National Student Marketing Corporation (NSMC) with violating section 32(a) of the Securities Exchange Act of 1934. It was alleged that the defendants had knowingly and willfully made false or misleading statements with respect to material facts in a proxy statement issued by NSMC and filed with the SEC in September 1969.

The single count of the indictment naming petitioner charged that the proxy statement was false in two respects. The first specification of falsity was directed to the audited financial statements of NSMC for the year ended August 31, 1968, which were included in restated form in the proxy statement filed with the SEC in September 1969. The first specification is not involved in these collateral proceedings. Since the jury returned only a general verdict, any defect in the second specification would entitle petitioner to a new

trial. Indeed, the court of appeals so held in this case in reversing the conviction of petitioner's co-defendant. See 527 F.2d at 325 (App. D, p. 27d).

The second specification of falsity involved NSMC's unaudited financials for the first nine months of fiscal 1969, which were also included in the proxy statement. The indictment charged that the unaudited nine-month earnings statement was false and misleading in that it reported net sales of \$11,313,569 and net earnings as \$702,270 when, "as the defendants well knew at the time the proxy statement was filed, 'net sales' for that period were less than \$10,500,000 and NSMC had no earnings at all." (Indictment, Count 2, ¶4).

The government's bill of particulars identified 17 contracts totalling more than \$800,000 in sales whose inclusion was alleged to have rendered the nine-month earnings statement false and misleading. One of the seventeen contracts, involving a commitment from Eastern Airlines, accounted for more than \$500,000 of the alleged \$800,000 overstatement of net sales. Revenues on those contracts, as with other fixed-fee contracts of NSMC for its development and implementation of marketing programs directed at the youth market, were accrued according to the "percentage-of-completion" method of accounting. Under that method, NSMC accrued as income a proportion of total revenues from the contract, based on the percentage of performance by the account executive rendered during the fiscal period in relation to his total anticipated performance.

The Eastern contract, which was the core of the second specification and was so treated by the court of appeals, see 527 F.2d at 320, 322, 329 (App. D, pp. 15d, 20d; App. F, p. 5f), and the government on direct

appeal, was booked by NSMC after the close of the nine-month period on the basis of a written commitment letter dated August 14, 1969. The letter stated that it was confirming an oral agreement reached during the nine-month period ended May 31, 1969. Revenue attributable to that contract was included in the nine-month earnings statement after petitioner had required NSMC to delete revenues attributed to a \$1.2 million Pontiac sale from the nine-month statement because NSMC had failed to obtain a binding written commitment from Pontiac.² Petitioner had repeatedly cautioned NSMC officers that he would not permit the company to book fixed-fee contracts without a binding written commitment letter. The final decision to delete the Pontiac contract was made late at night during the mid-August 1969 review session with NSMC's officers at the offices of the printer preparing the proxy statement, when it became evident that a written commitment in the proper form would not be forthcoming in time to meet the schedule then contemplated for filing the proxy with the SEC.

At the session, NSMC's president, Cortes W. Randell, indicated that a commitment letter in the proper form recently had been received from Eastern, and suggested that the Eastern contract be substituted for the Pontiac commitment. Approximately one week later, after examining the Eastern commitment letter and reviewing the work records of an NSMC account executive showing that he had spent more than 100

² Almost \$1 million in oral commitments that had been included in the audited 1968 financial statements had later been written off when it turned out that \$700,000 in purported sales had been fabricated by a sales executive (promptly fired by NSMC) and that others were not being implemented.

hours on the Eastern program during the nine-month period, petitioner permitted the inclusion of the Eastern contract. The figures in the proxy statement were revised to reflect the \$400,000 decrease in net sales attributable to the elimination of the Pontiac sale and the inclusion of the Eastern contract.

Petitioner testified at trial that he had no reason to question the Eastern contract, since (1) NSMC's president had mentioned prior to the August review session at the printer's that an Eastern commitment letter was expected; (2) the commitment letter in the proper form on Eastern Airlines stationery signed by Eastern's Manager of Special Markets was received by NSMC and stated that it was confirming an oral commitment given by Eastern in May 1969; (3) NSMC's written proposal was produced for petitioner's inspection and showed on its face that it had been submitted to Eastern in May; (4) NSMC records confirmed that a substantial amount of time had been expended on the Eastern proposal during the pertinent nine-month period; and (5) petitioner understood that NSMC had successful dealings with Eastern in prior years.

At trial, the government contended that the Eastern contract was "phony" and that its inclusion in the nine-month unaudited earnings statement rendered the proxy statement false. (Tr. 56, 65, 2269, 2295).³

The government at first attempted to establish that the Eastern commitment was fraudulent by offering to prove through two witnesses that NSMC had written off

³ References in the form "Tr." are to the stenographic transcript of petitioner's trial.

the Eastern contract several months after the filing of the proxy statement. On *voir dire*, the trial judge rejected the proffered testimony because the reason for the subsequent write-off, the breakdown in NSMC's campus representative division in early 1970, did not in any way reflect upon the genuineness of the Eastern commitment when petitioner included it in the nine-month earnings statement in August 1969, and there was no indication that petitioner should have known that the marketing system would later be abandoned. There was no other evidence offered to show what, if anything, was false about the contract that on its face and in light of NSMC's internal records was genuine.

After several requests from the jury for additional instructions on whether recklessness would be sufficient to find that the defendants had acted "knowingly" and (after initially reporting itself deadlocked) being advised that recklessness would suffice, petitioner and his co-defendant were convicted. Petitioner was fined \$10,000 and sentenced to imprisonment for one year, all but 60 days of which were suspended.⁴

C. Proceedings On Direct Appeal.

On appeal the Court of Appeals for the Second Circuit affirmed petitioner's conviction but reversed Scansaroli's. 527 F.2d 311 (App. D). The Court held that Scansaroli had been improperly convicted because the evidence was insufficient as a matter of law to

⁴ Following the denial of his motion for collateral relief petitioner served his prison term. He is presently serving the probationary portion of his sentence.

establish that he acted with criminal intent in permitting the inclusion of the Eastern contract. *Id.* at 322 (App. D, p. 20d). Since the jury was instructed to convict if it found that the proxy statement was materially false in *either* of two respects specified in the indictment, the court concluded that the government's failure of proof on the Eastern specification required reversal of Scansaroli's conviction. *Id.* at 324-25 (App. D, pp. 25d-27d).⁵

⁵ The Second Circuit held that Scansaroli had not "acted in reckless disregard of the facts" because he bore no duty "to be suspicious of the Eastern commitment and to pursue the matter further." *Id.* at 322 (App. D, p. 20d). Petitioner, however was found to have had such a duty. *Id.* at 320, 322 (App. D, pp. 17d, 20d). Although acknowledging that petitioner was dealing with an unaudited statement to which a duty of inquiry does not normally attach, the court held that, in view of the "suspicious" circumstances surrounding the Eastern contract, petitioner was obliged "to go beyond the usual scope of an accountant's review and insist upon some independent verification." *Id.* at 320 (App. D, p. 16d). It was petitioner's failure to take the step of "seeking verification from Eastern" that, in the court's view, made it appropriate to affirm his conviction on a "reckless disregard" theory. *Id.* at 320, 323 (App. D, pp. 16d, 23d). (However, when a PMM staff accountant later sought written verification of the Eastern contract, Eastern's Manager of Special Markets confirmed the validity of the contract).

The Second Circuit later reinstated Scansaroli's conviction on the government's motion for rehearing (see Appendix E *infra*) and then again vacated the conviction on Scansaroli's petition for rehearing (see Appendix F *infra*). *Id.* at 328-30. Those proceedings dealt with whether Scansaroli's counsel had adequately framed his objection to the lack of evidence. There is no question here about the sufficiency of petitioner's objection.

In his petition for a writ of certiorari, No. 75-808, petitioner argued, *inter alia*, that he was denied a fair trial because, as shown by evidence that had come to light after his conviction and appeal, the government had made erroneous statements to the jury on critical issues—the circumstances surrounding the Eastern commitment letter—and perhaps had done so knowingly. With respect to this issue, the Solicitor General stated in opposition to the petition:

“Whatever the merits of petitioner’s allegations of prosecutorial misconduct, they obviously are not suited for resolution by this Court in the first instance. The proper procedure is for petitioner to present his contentions to the district court in a motion for a new trial under Rule 33, Fed. R. Crim. P., or a motion to vacate his sentence under 28 U.S.C. §2255. A denial of certiorari would not preclude his following either of those paths.” (Brief for the United States in Opposition, *Natelli v. United States*, No. 75-808, p. 30).

This Court denied certiorari on April 19, 1976. 425 U.S. 934 (1976).

D. Proceedings On Motion for Collateral Relief.

Four days later, on April 23, 1976, petitioner filed a motion for a new trial pursuant to Rule 33 or, in the alternative, for relief pursuant to 28 U.S.C. §2255, as suggested by the Solicitor General. The motion advanced two grounds for relief. Petitioner contended that his conviction must be set aside because the government failed to introduce any evidence of the falsity of the Eastern Airlines contract, an essential part of the offense charged under the specification involving the

unaudited nine-month earnings statement. Although the government repeatedly argued at trial that the Eastern contract was a “complete phony,” petitioner’s jury was never given any *evidence* that the Eastern commitment letter was anything other than the binding contract it appeared to be.

Petitioner also sought relief on a second ground: the government’s misstatements concerning the Eastern contract to petitioner’s jury. At the trial, the government repeatedly characterized the Eastern commitment letter on which petitioner relied in withholding any objection to the unaudited financials as a document that had been concocted out of thin air at a supposedly sinister meeting at the printer’s office. According to the prosecutor, the Eastern commitment had been “hatched at three o’clock in the morning at the printer’s” (Tr. 65) and the petitioner knew that NSMC’s chief officers were “making these things up” (Tr. 2296). By reiterating its theme that the whole Eastern commitment had been fabricated in the dark of night with petitioner looking on, the government urged the jury to reject petitioner’s testimony that he had heard of an Eastern commitment prior to the session at the printer and had acted in good faith in permitting its inclusion in the unaudited nine-month earnings statement.

This version of events, repeatedly purveyed to petitioner’s jury not only in the prosecutor’s opening and closing arguments but in his examination of witnesses as well, was contradicted by the testimony of a government witness in trials that began after petitioner’s conviction had been affirmed by the court of appeals. The witness’ testimony at each of these subsequent trials had been foreshadowed by the government’s opening statement and elicited from the witness on direct examination by the prosecutor. This later version of the events surrounding the Eastern contract supported petitioner’s defense at his own trial.

Testifying as a government witness in the commercial bribery and perjury prosecutions of Thomas Mullen, the Eastern Airlines executive who signed the Eastern commitment letter,⁶ NSMC's former president Cortes Randall dispelled any impression that the Eastern contract had been concocted at the printer's. Instead, he testified, Mullen *had* in fact worked with an NSMC account executive for several months prior to the end of the relevant nine-month period in May 1969, Mullen *had* made an oral commitment at that time, and Mullen *had* signed the written commitment letter shown to petitioner on August 15 — precisely as represented in the letter upon which petitioner relied.

The *Mullen* trial testimony showed a possible infirmity in the Eastern contract but one which was never placed before petitioner's jury, and would have supported petitioner's defense if it had been. Mullen, it developed, may have lacked actual authority to commit Eastern to a program of the size of this particular commitment in advance of the preparation of the company's budget. (His apparent authority to commit Eastern, however, had never been questioned even in later audits of NSMC conducted by accountants the government acknowledged to be "honest.")

Also, before signing the commitment letter, Mullen had demanded and received from Randell a side letter rendering the Eastern commitment cancellable upon thirty-days written notice. (The government concedes that the existence of that side letter was concealed

⁶ Mullen was indicted both for commercial bribery, *United States v. Mullen*, 75 Cr. 335 (S.D.N.Y., indictment filed April 1, 1975) and for perjury, *United States v. Mullen*, 75 Cr. 179 (S.D.N.Y., indictment filed February 21, 1975).

from petitioner when the commitment letter was provided to him.) Neither any restriction on Mullen's actual authority nor the critical side letter was ever alluded to at petitioner's trial. Had these facts been placed before petitioner's jury, they could only have shown that petitioner was defrauded by Randell and Mullen, rather than that, as the government was urging, he had engaged in "willful connivance" with Randell and others to defraud the public.⁷

Without holding an evidentiary hearing to inquire into the prosecutor's knowledge, prior to petitioner's trial, of the events revealed at the *Mullen* trials, the district court denied petitioner's motion. App. C, pp. 2c-4c. The court of appeals affirmed, holding that petitioner was foreclosed from raising collaterally his contention under the Due Process Clause that a conviction lacking any evidence of an essential element of the crime cannot stand. The court concluded that such an issue may be raised only where the failure of proof becomes clear as the result of an intervening change of law. On the second issue, the court refused to "assume" that Randell's testimony at the *Mullen* trials "was accurate" and, despite the absence of an evidentiary hearing on the question, assumed that it was not. App. A, pp. 4a-5a. The Court did not address the

⁷ Randell had pleaded guilty to various charges prior to petitioner's trial, but was not called as a witness. In April 1976, Randell testified at a deposition in the civil proceeding commenced by the SEC that, prior to petitioner's trial, he had told the prosecutor the true background of the Eastern contract. Deposition of Cortes W. Randell, April 30, 1976, pp. 325-333, filed in *In re National Student Marketing Litigation* (D.D.C. Misc. 134-72) (M.D.L. Docket No. 105).

argument that the government's presentation of a false version of the facts to petitioner's jury — perhaps knowingly — entitled him to relief under §2255, reasoning that petitioner was on notice of the true facts and thus could not claim "newly discovered evidence" entitling him to relief under Rule 33. App. A, p. 5a.⁸

REASONS FOR GRANTING THE WRIT

I.

A. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *SANDERS v. UNITED STATES*, 373 U.S. 1 (1963), AND OTHER CASES ON THE AVAILABILITY OF COLLATERAL RELIEF.

The Second Circuit rejected petitioner's challenge to his conviction without reaching the merits of his contention that the government failed to introduce evidence of an essential element of the offense — the specified falsity of the proxy statement filed with the SEC. The court held that "once a matter has been decided adversely to a defendant on direct appeal it

⁸The court asserted that Randell's later testimony in any event fortified the government's position that the Eastern commitment was "totally fraudulent" because it had been "produced by reason of bribes to Mullen." App. A, p. 5a. In fact, however, the trial judge at Mullen's bribery trial directed a verdict of acquittal, holding that the government had failed to make out even a *prima facie* case that Mullen had signed the commitment letter as a result of a bribe or for any other corrupt motive. *United States v. Mullen*, 75 Cr. 335, (S.D.N.Y.) Trial Tr. pp. 238-49.

cannot be relitigated in a collateral attack under Section 2255," except where there is "an intervening change of law." App. A, p. 3a.⁹ The decision below conflicts directly with this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1963), and related cases. The Court has repeatedly emphasized that the doctrine of res judicata is inapplicable in habeas corpus proceedings. See, e.g., *Sanders v. United States*, *supra*, 373 U.S. at 7-8; *Fay v. Noia*, 372 U.S. 391, 423 (1963); *Salinger v. Loisel*, 265 U.S. 224, 230 (1924).¹⁰ As the Court explained in *Sanders*:

"Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia*, *supra* (372 U.S. at 402), access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas corpus, then, is inherent in the very role and function of the writ." 373 U.S. at 8.

The decision below, although not expressly invoking the doctrine of res judicata, adopted a similar rule equally inconsistent with the role of collateral relief as

⁹The government's argument below that the Second Circuit had expressly considered and rejected the claim on direct appeal rests on a single, ambiguous sentence contained in the court's statement of the case. The absence of any explicit finding by any court regarding how the alleged falsity of the Eastern contract was in fact proved leaves no proper room here for even a discretionary refusal to "reconsider" the issue.

¹⁰It is well established that "§2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis v. United States*, 417 U.S. 333, 343 (1974), see *Hill v. United States*, 368 U.S. 424, 427 (1962); *United States v. Hayman*, 342 U.S. 205, 219 (1952).

a safeguard against unjust criminal convictions. The nearly absolute prohibition on the re-examination of erroneous decisions announced by the Second Circuit in this case "exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief." *Kaufman v. United States*, 394 U.S. 217, 228 (1969).

While a prior adverse determination on direct appeal may properly be accorded weight by a court considering a §2255 motion, the prior determination in itself cannot bar consideration of the merits where "the need for the remedy afforded by the writ of habeas corpus is apparent." *Sunal v. Large*, 332 U.S. 174, 180 (1947) quoting *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). The contrary rule embraced by the court below is fundamentally inconsistent with the historic function of habeas corpus as a "means . . . of redressing an unjust incarceration." *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-58 (1973) (Powell, J., concurring).

In *Sanders*, the court held that, even in a *second* or *successive* application for collateral relief:

"Controlling weight may be given to denial of a prior adjudication for federal habeas corpus or §2255 relief *only if* (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." 373 U.S. 1, 15 (footnote omitted) (emphasis added).

The Court then expressly rejected the notion that only "an intervening change in the law" would suffice to

show that the ends of justice warranted reexamination of a ground previously rejected on the merits. *Id.* at 16-17.

It follows *a fortiori* that an applicant's *first* plea for collateral relief cannot be lightly rejected solely on the ground of adjudication on direct appeal. This Court has so recognized by applying the standards announced in *Sanders* to hold that an initial §2255 motion was not barred by a prior determination on direct appeal. *Davis v. United States*, 417 U.S. 333 (1974). See also *Laughlin v. United States*, 154 U.S. App. D.C. 196, 474 F.2d 444 (1972) *cert. denied*, 412 U.S. 941 (1973); *Jack v. United States*, 435 F.2d 317 (9th Cir. 1970) *cert. denied*, 402 U.S. 933 (1971). Although *Davis* actually involved a situation in which there had been an intervening change in the law, the court in no way suggested that this factor was indispensable to the availability of collateral relief.

The holding below that a prior determination of an issue bars its reconsideration on collateral attack absent an intervening change of law also conflicts with decisions of other courts of appeals which have followed *Sanders*. In *Laughlin v. United States*, *supra*, 154 U.S. App. D.C. at 204, 474 F.2d at 452, the District of Columbia Circuit held that under *Sanders* the district judge may re-examine any ground of relief previously presented and rejected on the merits if he finds in the exercise of his sound discretion "that the 'ends of justice' would be served thereby."¹¹ Similarly, the Ninth Circuit has concluded that "[i]f the district court dismisses a petition on the basis of a prior adjudication, it must make a specific finding that the ends of justice would not be served by reaching the

¹¹Virtually all of the issues raised by the appellant in *Laughlin* "had been previously raised, argued, and decided at trial, on direct appeal, on the petition for rehearing, or at all three stages." 154 U.S. App. D.C. at 202, 474 F.2d at 450.

merits." *Tannehill v. Fitzharris*, 451 F.2d 1322, 1324 (9th Cir. 1971). *Accord Stephens v. United States*, 341 F.2d 100 (10th Cir. 1965).¹²

The Solicitor General has previously acknowledged in his brief in the *Davis* case that the fact of prior adjudication does not affect the availability of relief under §2255.

"We agree with petitioner that he may be placed in no worse position for having raised the issue than he would have been in had he failed to avail himself of the opportunity to raise it; insofar as the court of appeals' opinion may be read to suggest a contrary conclusion, we think that it is not consonant with this Court's holding in *Sanders v. United States*, 373 U.S. 1. The relevant inquiry in this case is not whether the issue was actually dealt with in the prior litigation . . . but whether it is the kind of claim as to which Section 2255 confers an opportunity for a second litigation." Brief for the United States in *Davis v. United States*, No. 72-1454 at 25 n.11.

¹²We acknowledge that other courts have held that issues decided on direct appeal cannot be relitigated in a §2255 proceeding. See, e.g., *Stein v. United States*, 390 F.2d 625, 626 (9th Cir. 1968); *Castellana v. United States*, 378 F.2d 231, 233 (2d Cir. 1967); *Sykes v. United States*, 341 F.2d 104, 105 (8th Cir. 1965). These cases indicate that the decision below, rather than being an isolated departure from the standards announced by this Court in *Sanders*, is representative of serious confusion among the lower federal courts over the application of §2255.

This situation illustrates the continuing validity of Justice Frankfurter's observation that "the scope of habeas corpus in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal v. Large*, 332 U.S. 174, 184 (1947) (dissenting opinion). Review in this case is warranted to clarify the standards governing relitigation of issues in §2255 proceedings.

Although the court below did not address the pivotal question identified by the Solicitor General, the issue raised by petitioner — the failure of the government to introduce proof of a critical element of the offense — concerns a fundamental defect cognizable in a §2255 proceeding.

B. THE ENDS OF JUSTICE WARRANT CONSIDERATION OF THE MERITS OF PETITIONER'S CLAIM.

Petitioner sought relief pursuant to 28 U.S.C. §2255 in part on the ground that the government failed to introduce any relevant evidence establishing the falsity of the proxy statement as specified in the indictment — an essential element of the offense of knowingly submitting to the SEC a proxy statement containing a false statement in violation of section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff. It is hard to imagine an issue that, if well founded, more clearly poses "a fundamental defect which inherently results in complete miscarriage of justice," *Davis v. United States*, *supra*, 417 U.S. at 346 quoting *Hill v. United States*, *supra*, 368 U.S. at 428. As this Court has repeatedly held, "'a conviction based on a record lacking any relevant evidence as to a critical element of the offense charged . . . violate[s] due process.'" *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam), quoting *Harris v. United States*, 404 U.S. 1232, 1233 (1971) (Douglas, J., in chambers); see, e.g., *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam); *Thompson v. Louisville*, 362 U.S. 199, 204 (1960). Petitioner's claim thus goes to "the central

reason" for the existence of collateral attack — "remedying injustice to the individual." *Schneckloth v. Bustamonte*, 412 U.S. 218, 257 (1973) (Powell, J., concurring).

Courts often have held that failure to introduce relevant proof regarding a critical element of the offense charged constitutes a fundamental defect justifying the granting of relief on a §2255 motion. See, e.g., *United States v. Loschiavo*, 531 F.2d 659, 666-67 (2d Cir. 1976); *Robson v. United States*, 526 F.2d 1145 (1st Cir. 1975); *United States v. Travers*, 514 F.2d 1171, 1175-77 (2d Cir. 1974); *United States v. Liguori*, 438 F.2d 663, 669 (2d Cir. 1971).¹³ While most of these cases have involved an intervening change of law, the fundamental defect warranting the granting of relief under §2255 in all the cases is the essential unfairness of preserving a judgment of conviction, with its grave attendant consequences, on a record devoid of evidence of guilt of the offense charged. Indeed, since it is conceded even by the court below that a defendant can collaterally relitigate the absence of critical proof as defined by an intervening change in law, is it not at least equally just to afford a remedy to a defendant

¹³Contrary to the Second Circuit's characterization (App. A, p. 3a), *Robson* did not involve an intervening change of law. Relying on a 1943 decision of this Court, the First Circuit held that Robson's conviction had to be set aside as a violation of due process because the government failed to introduce an essential item of proof. 526 F.2d at 1148-49. Although the First Circuit had rendered a relevant decision on the issue after Robson's direct appeal, that case was consistent with, rather than a change in, the existing case law. See *United States v. Malde*, 513 F.2d 97, 99-100 (1st Cir. 1975).

who, like petitioner, was wrongly convicted in the first instance?

II.

IN SUMMARILY RESOLVING CONTESTED FACTUAL ASSERTIONS AGAINST PETITIONER, THE COURTS BELOW REFUSED TO FOLLOW THE PLAIN LANGUAGE OF 28 U.S.C. §2255, THIS COURT'S DECISIONS, AND DECISIONS IN OTHER COURTS.

Petitioner's motion sought relief on the further ground that the prosecutor had, perhaps knowingly, made materially misleading assertions to the jury concerning critical events surrounding the Eastern commitment letter. Throughout petitioner's trial, the prosecutor repeatedly referred to the Eastern commitment letter in language indicative of fabrication and forgery: a document "hatched" at three o'clock in the morning, a "complete phony," which had appeared "by magic" at that supposedly sinister hour. Six times during his opening statement, five times during summation, and on numerous occasions during examination of witnesses, the prosecutor reminded the jury that the Eastern contract was being discussed at three o'clock in the morning. The theme of an alleged 3 A.M. fabrication was played and replayed in an effort to persuade the jury that the letter lacked any legitimate basis in NSMC's prior activities, and that petitioner must have known the letter to be a fake when it appeared.

A far different version of the critical events emerged from the testimony by the key government witness, former NSMC president Randell, in two related trials that did not commence until after petitioner's conviction had been affirmed on direct review. His account, as forecast in the prosecutor's opening arguments in the *Mullen* trials and elicited on direct examination, contradicted the prosecutor's version of events at petitioner's trial and instead supported petitioner's defense. Rather than a 3 A.M. fabrication, the Eastern commitment letter was in fact signed by Eastern's Manager of Special Markets and was the culmination of extensive efforts by NSMC with Eastern — precisely the understanding which petitioner had testified had been conveyed to him and formed the basis for his decision not to object to NSMC's inclusion of accrued revenues attributable to the Eastern commitment in the company's unaudited financials.¹⁴

¹⁴Had the government introduced at petitioner's trial the "side agreement" with Mullen, it might have strengthened its case on one essential element of the offense — the actual falsity of the Eastern contract — but would have virtually destroyed its case on another equally essential element: petitioner's *knowledge* of any infirmity in the Eastern contract. Proof of the side agreement would have shown that petitioner was the victim of a fraud, not a participant in it. The government's failure to introduce the side letter at petitioner's trial is therefore hardly understandable except as a matter of litigation tactics.

The point is, however, that the government was not entitled both to disregard this evidence and to urge upon the jury assertions contrary to actual fact and flatly contradicted by evidence that was not introduced.

It is settled law that a defendant is denied a fair trial when the prosecutor misstates the truth in argument to the jury, *Miller v. Pate*, 386 U.S. 1 (1967) or purveys a "false impression," *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). Petitioner's §2255 motion showed a blatant contradiction of the prosecutor's remarks with the later sworn testimony of the key government witness in related prosecutions and with the government's own arguments in those cases. Petitioner argued in the courts below that, since the prosecutor in the *Mullen* bribery trial had forecast Randell's testimony in his opening statement and had urged the jury to believe Randell's testimony despite his own earlier transgressions, the existing record clearly establishes his right to a new trial. Alternatively, however, petitioner sought an evidentiary hearing to resolve any contested factual issues relating to the accuracy of Randell's testimony and the prosecutor's awareness of the truth at the time of petitioner's trial.¹⁵

The district court denied petitioner's motion without a hearing, and the court of appeals affirmed stating that it could not "assume" that Randell's version of the crucial events, rather than the version the prosecutor

¹⁵Petitioner brought to the attention of the court below Randell's recent deposition testimony that, prior to petitioner's trial, he had discussed the background to the Eastern Commitment with the Assistant United States Attorney who prosecuted petitioner. Petitioner suggested that the amount of information in the government's possession prior to trial bearing upon the prosecutor's statements should at least be explored further. The government resisted this suggestion and the court below did not address it.

urged upon petitioner's jury, was accurate. App. A, p. 5a. This summary disposition was clear error, however, for the law does not allow resolution of contested factual assertions against a §2255 movant in the absence of an evidentiary hearing. The statute explicitly states:

"Unless the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief, the court *shall* grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

28 U.S.C. §2255 (emphasis added).

This language establishes an exacting standard for summary disposition of a §2255 motion, one which cannot be satisfied simply by examination of the trial record and assuming away the credibility of extra-record information. As this Court has consistently held, where a §2255 motion presents material outside the trial record, it is improper to look only to the trial record and resolve any doubts in favor of the fairness and regularity of the reported proceedings. Instead, the court must examine the movant's supplementary materials and resolve any contested factual issues only after conducting an evidentiary hearing. See e.g., *Fontaine v. United States*, 411 U.S. 213 (1973); *Sanders v. United States*, *supra*, 373 U.S. at 20; *Machibroda v. United States*, 368 U.S. 487, 494-495 (1962). Indeed, even if the allegations presented on a §2255 motion appear "improbable and unbelievable" in contrast to the existing record, summary disposition of the motion is improper. *Machibroda v. United States*,

supra, 368 U.S. at 495.¹⁶ Other courts of appeals have followed the statutory command and this Court's implementation of it, recognizing that an evidentiary hearing must be granted whenever the motion sets forth facts which, if accepted as true, would warrant relief. See e.g., *Anderson v. United States*, 443 F.2d 1226 (10th Cir. 1971); *Pike v. United States*, 409 F.2d 499 (5th Cir. 1969); *Zurita v. United States*, 410 F.2d 477 (7th Cir. 1969); *Reagor v. United States*, 488 F.2d 515 (5th Cir. 1973); *Daugherty v. United States*, 426 F.2d 263 (6th Cir. 1970).

Petitioner's §2255 motion asserted that his conviction was procured by misstatements made to his jury, an assertion which, if accepted as true, clearly entitled him to relief.¹⁷ In stark contrast to the even "improbable and unbelievable" allegations which, this Court has

¹⁶The rules which this Court has promulgated for the conduct of §2255 proceedings in the district courts reflect the necessity for resolution of disputed factual assertions and provide, *inter alia*, for discovery by leave of court which may obviate the need for an evidentiary hearing. (See Rules 6, 7, 8). Those rules were not in effect at the time petitioner's §2255 motion was before the district court, and the government opposed defense efforts to learn what information about the Eastern commitment was in the government's possession prior to petitioner's trial.

¹⁷It is of no consequence that, as the court below observed, "[t]here is no claim here of suppression of evidence by the government or perjury by government witnesses." App. A, p. 6a. The defendant's constitutional rights are violated as much by prosecutorial misstatement as by suppression or perjury. See *United States v. Agurs*, 427 U.S. 97, 103-104 (1976); *Ring v. United States*, 419 U.S. 18, 19 (1974) (per curiam); *Miller v. Pate*, 386 U.S. 1 (1967). Similarly irrelevant is the observation by the court below, almost as an afterthought, that petitioner would not be entitled to a new trial merely to "produce the testimony of Randell." (App. A, p. 6a). Petitioner is not seeking to have a new trial in which Randell's testimony is produced, but simply one in which the prosecutor refrains from stating as fact critical assertions which are untrue.

held, cannot be rejected summarily, *Machibroda v. United States*, 368 U.S. at 494-495, petitioner's assertions are supported by the sworn testimony of a government witness in related subsequent prosecutions. The court below stated that it was unwilling to "assume" the accuracy of Randell's sworn testimony, but the flaw in that comment is that the courts below were forbidden to "assume" his testimony was *not* true. That is why a hearing was mandatory.

The court below gave only one reason for its willingness to indulge the converse assumption that the prosecutor's statements were accurate: Randell's criminal record which purportedly made him a "hostile" witness. App. A, p. 5a. The criminal record of a witness, however, supports no irrebutable presumption that his sworn testimony is untrue; the government, indeed, expressly supported Randell's credibility at the trials in which it called him.¹⁸ The bare affidavit of a criminal defendant is sufficient to create a controverted factual issue requiring an evidentiary hearing, *Fontaine v. United States*, *supra*; *Sanders v. United States*, *supra*; *Machibroda v. United States*, *supra*. It follows *a fortiori* that the sworn testimony of a government witness in later judicial proceedings, at variance with the prosecutor's statements in the first case, is a compelling basis for an evidentiary hearing under §2255. It was clear error, therefore, for the court below to resolve the controversy summarily in the government's favor.

¹⁸While acknowledging Randell's guilty plea to securities fraud charges and characterizing him as "no friend of the government," the prosecutor at the *Mullen* perjury trial urged the jury *not* to discredit Randell's testimony solely because of his prior conviction. (Tr. 348).

If the government was to be allowed to argue that its own witness had not told the truth, the district court was obliged to make its own assessment after an adequate evidentiary hearing.¹⁹ That was the procedure expressly contemplated when the Solicitor General, in direct review, opposed a summary remand of the case pursuant to *Ring v. United States*, *supra*. See p. 10, *supra*. This Court was previously led to believe that the procedures required by §2255 and by its own decisions would be observed if it denied certiorari instead of remanding for a hearing. Unfortunately, it is now necessary for this Court to grant review and to command that observance.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP A. LACOVARA,
Hughes Hubbard & Reed
JOHN S. MARTIN, JR.,
Martin, Obermaier &
Morvillo

April 27, 1977

¹⁹The district judge who summarily denied relief under §2255 had not been the trial judge either at petitioner's trial or at the *Mullen* trials. Thus, he had no personal basis for assessing credibility without a hearing.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 920 – September Term 1976

Argued March 9, 1977

Decided March 28, 1977

Docket No. 76-1494

UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY M. NATELLI,

Defendant-Appellant.

Before SMITH, FEINBERG and MULLIGAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Richard Owen, Judge, denying a motion for a new trial pursuant to Fed. R. Crim. P. 33, or alternatively for relief pursuant to 28 U.S.C. §2255.

Affirmed.

JED S. RAKOFF, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Lawrence B. Pedowitz, Assistant United States Attorney, of Counsel), for Appellee.

PHILIP A. LACOVARA, Washington, D.C. (Hughes Hubbard & Reed, Washington, D.C., Jay K. Wright, Ronald A. Stern, John S. Martin, Jr.,

of Counsel; Martin, Obermaier & Morvillo, New York, New York, on the brief), for Defendant-Appellant.

(Victor M. Earle, III, New York, New York, and Cahill Gordon & Reindel, New York, New York; Howard J. Krongard, William F. Hegarty, Mathias E. Mone, George Wailand, of Counsel), for Peat, Marwick, Mitchell & Co., Amicus Curiae.

PER CURIAM:

The appellant Anthony M. Natelli is an accountant who was convicted in the United States District Court for the Southern District of New York of making false and misleading financial statements in a proxy statement of National Student Marketing Corporation (NSMC) in violation of section 32 of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, as well as aiding and abetting those violations, 18 U.S.C. §2. Joseph Scansaroli, an accountant who worked under Natelli's direction, was a co-defendant. Both were convicted on November 14, 1974 after a four-week jury trial before Hon. Harold R. Tyler, Jr., then a United States District Judge. While Natelli's conviction was affirmed on appeal, Scansaroli's conviction was initially reversed, then later reinstated on the government's petition for rehearing. On Scansaroli's petition for a rehearing the original reversal and remand for a retrial was reinstated. The opinions of this court fully setting forth the facts and the law were authored by Judge Gurfein and are reported at 527 F.2d 311 (1975), cert. denied, 425 U.S. 934 (1976). Natelli then moved for a new trial pursuant to Fed. R. Crim. P. 33, or in the alternative for relief pursuant to 28 U.S.C. §2255. On

October 20, 1976 Hon. Richard Owen, United States District Judge for the Southern District of New York, denied the relief sought in a five-page opinion. This appeal followed.

Natelli argues that there was insufficient evidence to support his conviction. Specifically, he urges that the United States failed to establish that a letter signed by Thomas Mullen, an executive of Eastern Airlines, "committing" his company to purchase NSMC services was false and misleading and known to be such by Natelli. This collateral attack must be rejected. As found by Judge Owen, the precise issue was raised by Natelli on a motion for acquittal at the conclusion of the government's case and on a motion for a new trial after the verdict in the district court, on his appeal to this court, on his motion for rehearing as well as on the petition for a writ of certiorari. The issue was specifically considered and rejected by Judge Gurfein in his opinion for this court, 527 F.2d at 318-21. Appellant does not dispute this but argues that the rule barring a collateral attack on the disposition of issues previously litigated should yield in the interests of justice. However, the authorities relied upon such as *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976) and *Robson v. United States*, 526 F.2d 1145 (1st Cir. 1975) involve situations where there was an intervening change of law after the initial decision was reached. See *Davis v. United States*, 417 U.S. 333 (1974). There is no such circumstance here and we find no reason to depart from the case law that once a matter has been decided adversely to a defendant on direct appeal it cannot be relitigated in a collateral attack under section 2255. *Meyers v. United States*, 446

F.2d 37, 38 (2d Cir. 1971); *United States v. Granello*, 403 F.2d 337, 338 (2d Cir. 1968), cert. denied, 393 U.S. 1095 (1969).

Appellant's second argument is equally unpersuasive and is analyzed in Judge Owen's opinion below. Natelli claims that the government presented an "erroneous version" of the facts to the jury in arguing that one of the indications that the so-called Eastern Airlines commitment was phony or fraudulent was its sudden production at 3 a.m. on the morning of August 15, 1969 in the office of a printer when Natelli deleted the Pontiac commitment and substituted Eastern in the nine-months earnings statement. The incident and its patently irregular circumstances are fully discussed in Judge Gurfein's opinion under the heading "B. *The False Nine-Months Earnings Statement*," 527 F.2d at 317-18. Some eleven months after Natelli's trial, Cortes W. Randell, former president of NSMC, testified as a witness in criminal proceedings brought against Thomas E. Mullen, the author of the Eastern commitment letter in issue. Randell testified that NSMC had made a proposal to Eastern prior to the end of May 1969 and that Mullen, having expressed a desire to proceed with the program, followed up with the letter upon which Natelli allegedly relied. Natelli argues that since Randell was a government witness in the Mullen trial, the United States must have known the facts and therefore its position at the Natelli trial that the letter was "phony" was misleading. It is urged this new evidence justified a new trial.

The argument is without merit. In the first place, it can hardly be considered new evidence under Rule 33. It is basic that a defendant seeking a new trial must establish that the newly discovered evidence could not

with due diligence have been discovered at or before trial. *United States v. Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), cert. denied, 97 S. Ct. 65, 66 (1976). The fact is that Natelli testified at his own trial that he had advised Randell previous to August 15, 1969 that the Pontiac commitment would be disallowed and that Randell made mention of the fact that Eastern had made an oral commitment prior to the expiration of the nine-month period involved in the audit. The evidence cannot now be claimed to be new. If Natelli wished to obtain the corroboration of his version of the facts, he could have called Randell as a witness. In fact, his counsel admittedly made a tactical decision not to call Randell. Hence it cannot be deemed to be new evidence. There was no obligation on the part of the United States to call Randell as a witness to support Natelli's version of the facts.

Nor is there any merit to the contention that on the basis of this subsequent testimony the government's version of the Eastern Airlines retroactive inclusion of expected earnings was erroneous. This assumes, of course, that Randell's testimony was accurate. He was an admitted swindler and briber who was a hostile witness in the subsequent proceedings. As we have indicated, he was never called to corroborate the defense's version at Natelli's trial. His later admissions, if anything, fortify the position of the government that the Eastern commitment was in fact totally fraudulent. It was produced by reason of bribes to Mullen and was accompanied by a "side agreement" permitting Eastern to cancel on 30 days notice prior to December 31, 1969. Randell in fact pleaded guilty to conspiracy and fraud prior to Natelli's trial and, as the court found below, the transcripts of the allocutions of Randell and

Kelly (a co-defendant) were available to Natelli on trial. These transcripts disclosed the existence of the "side agreement," making Natelli's argument that both he and his jury were unaware of this possible flaw in the Eastern commitment ring hollow. There is no claim here of suppression of evidence by the government or perjury by government witnesses. Upon analysis, Natelli's argument is reduced to the claim that he is entitled to a new trial to produce the testimony of Randell which in our view is at best questionable, was previously available and in any event would not be of any significant assistance to Natelli. The order below is therefore affirmed.

APPENDIX B

United States Court of Appeals

FOR THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT SECOND CIRCUIT
FILED MARCH 28, 1977
A. DANIEL FUSARO, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of March one thousand nine hundred and seventy-seven.

Present: HON. J. JOSEPH SMITH

HON. WILLIAM F. BRYAN

HON. WILLIAM H. MULLICAN

Circuit Judges,

United States of America,
Plaintiff-Appellee

v.

Cortes W. Randell, Robert C. Bushnell,
John G. Davies, Dennis M. Kelly, Bernard
J. Kurek, Anthony M. Natelli, Joseph
Scansaroli,

Defendants

76-1494

Anthony M. Natelli,
Defendant-Appellant.

Appeal from the United States District Court for the Southern
District of New York.

This cause came on to be heard on the transcript of record from the
United States District Court for the Southern District of
New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,
and decreed that the order of said District
Court be and it hereby is affirmed in accordance with the opinion of
this court.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,) 74 Cr. 43
-against-) MEMORANDUM
ANTHONY M. NATELLI,) AND ORDER
Defendant.)

OWEN, District Judge

Before me are two motions by defendant Anthony M. Natelli convicted by a jury in 1974 of preparing false and misleading financial statements in a proxy statement required to be filed with the Securities and Exchange Commission in violation of Title 15, United States Code, §§77ff and 78n and Title 18, United States Code, §2. He was sentenced by Judge Harold R. Tyler to serve 60 days of a one year term, the balance to be served on unsupervised probation, and fined \$10,000. This conviction was affirmed on appeal. Natelli now moves for a new trial on the basis of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure and also for an order reducing the sentence imposed to probation pursuant to Rule 34. Both motions are denied.

I.

Motion to Reduce Sentence.

It is clear from reading the sentencing minutes that Judge Tyler agonized over his decision to impose the term of incarceration that he did. The only new factor, not considered by Judge Tyler, which Natelli urges upon me is that family tragedies which have occurred since imposition of sentence make it appropriate for me to reduce his sentence. I am aware and distressed that it is often the families who suffer most in these situations. However, nothing which has been presented to me persuades me that Judge Tyler's carefully considered sentence should be disturbed.

II.

Motion for a New Trial.

The basis for Natelli's claim that he is entitled to a new trial is prosecutorial "misstatements" during the trial and summation that are allegedly contradicted by testimony of codefendant Cortes Randell, former president of National Student Marketing Corp., given some eleven months later as a witness at the trial of Thomas E. Mullen, the Eastern Airlines executive who wrote the phony commitment letter. This letter, presented by Randell to Natelli as a substitute for the rejected Pontiac "commitment" the night at Pandick Press, was the basis of including the Eastern "commitment" in the proxy statement.

No real contradictions appear, however, since it had been brought out at Natelli's trial both that Natelli had, prior to that night at Pandick Press intimated that the Pontiac "commitment" would not be allowed and further that Natelli had heard about the Eastern "sale" prior to that night. Defendant builds a house of cards which, under sharp scrutiny, falls.

The government does not vouch for everything a witness it calls may volunteer, *see* Rule 607, Fed.R. Evid., and certainly did not vouch for Randell, whom it considered a hostile witness at the *Mullen* trial. The government further had no obligation to call Randell or any other witness at the Natelli trial.

All this is immaterial, however, since

"[i]t must be remembered that 'a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or at latest, at trial.'"

United States v. Stofsky, 527 F.2d 237, 244 (2d Cir. 1975), *quoting United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

Natelli, when he took the stand at his trial, testified that he had told Randell and others prior to the night at Pandick Press that he would not allow the Pontiac "contract" and also that he had heard about the Eastern proposal sometime "right prior to" the night at Pandick. These two facts, testified to by Natelli and others, are the substance of the "newly discovered evidence." That Randell may have corroborated that testimony does not make the evidence newly discovered. Natelli was present at some of the conversations with Randell. Further, Natelli had the transcripts of

the allocutions of Randell's and Kelly's (another co-defendant) guilty pleas. Natelli argued on appeal — this prior to the *Mullen* trial — and in his petition for rehearing that the government deliberately chose not to call Randell, whose testimony would have exculpated him. The "evidence" is hardly newly discovered.

While, as was his right, Randell refused to speak with defendants' counsel prior to trial, Natelli was still free to call him as a witness. He could also have interviewed and called other codefendants who had pled guilty. He chose not to as a tactical decision. Natelli has failed to meet his due diligence burden. *See United States v. Tramunti*, 500 F.2d 1334, 1349 (2d Cir. 1974); *United States v. Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *United States v. Brawer*, 367 F. Supp. 156, 174 (S.D.N.Y. 1973), *aff'd*, 496 F.2d 703 (2d Cir. 1974).

Natelli's final point is that the government has failed to prove the falsity of the Eastern contract, an essential element of the crime. This point has been argued and rejected as without merit by the trial court, the jury and the Court of Appeals. From a review of the evidence in this area, the argument has not gained merit in the ensuing months.

For the foregoing reasons, defendant's motions are denied.

So Ordered.

/s/ [illegible]

October 20, 1976.

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1035 & 1036—September Term, 1974.

(Argued April 10, 1975

Decided July 28, 1975.)

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee.

against

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

Before:

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

Appeal from judgments of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*, finding appellants, two accountants, guilty on a single count of violating 15 U.S.C. § 78ff(a) by making materially false statements in a proxy statement filed with the Securities Exchange Commission.

Held: As to Natelli, the evidence was sufficient to support the conviction and no errors of law were made. As to Scansaroli, the evidence with regard to one of the two specifications in the count was insufficient to show that he had failed to fulfill a duty arising from his position.

Affirmed in part; reversed and remanded in part.

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JOHN S. MARTIN, JR., New York, N.Y. (Martin, Obermaier & Morvillo, Philip A. Lacovara and Betty J. Santangelo, New York, N.Y., and Hughes, Hubbard & Reed, Washington, D.C., of counsel), for Defendant-Appellant Natelli.

CHARLES A. STILLMAN, New York, N.Y. (Morrison, Paul, Stillman & Beiley, Peter H. Morrison, Benjamin Zelernmyer and Edward D. Tanenhaus, New York, N.Y., of counsel), for Defendant-Appellant Scansaroli.

FRANKLIN B. VELIE, Assistant United States Attorney, New York, N.Y. (Paul J. Curran, United States Attorney, and Jed S. Rakoff, Audrey Strauss and John D. Gordan, III, Assistant United States Attorneys, of counsel), for Appellee.

VICTOR M. EARLE, III and CAHILL GORDON & REINDEL (Howard J. Krongard, William E. Hegarty, Mathias E. Mone, George Wailand, of counsel), for Peat, Marwick, Mitchell & Co. as *Amicus Curiae*.

CRAVATH, SWAINE & MOORE, New York, N.Y. (John R. Hupper, Robert Rosenman and J. Barclay Collins, New York, N.Y., of counsel), for American Institute of Certified Public Accountants as *Amicus Curiae*.

GURFEIN, Circuit Judge:

Anthony M. Natelli and Joseph Scansaroli appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on

December 27, 1974 after a four week trial before the Hon. Harold R. Tyler and a jury. Judge Tyler imposed a one year sentence and a \$10,000 fine upon Natelli, suspending all but 60 days of imprisonment, and a one year sentence and a \$2,500 fine upon Scansaroli, suspending all but 10 days of the imprisonment.

Both appellants are certified public accountants. Natelli was the partner in charge of the Washington, D.C. office of Peat, Marwick, Mitchell & Co. ("Peat"), a large independent firm of auditors, and the engagement partner with respect to Peat's audit engagement for National Student Marketing Corporation ("Marketing"). Scansaroli was an employee of Peat, assigned as audit supervisor on that engagement.

Appellants were charged and tried only on Count Two of a multi-count indictment against other defendants connected with Marketing.

Count Two of the indictment charged that, in violation of Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a),¹ four of Marketing's officers and the appellants, as independent auditors, "willfully and knowingly made and caused to be made false and misleading statements with respect to material facts" in a proxy statement for Marketing dated September 27, 1969 and filed with the Securities Exchange Commission (SEC) in accordance with Section 14 of the 1934 Act, 15 U.S.C. § 78n.

¹ Section 32 provides in relevant part:

"Any person . . . who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (c) of section 78n of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, . . ." (Emphasis added.)

The proxy statement was issued by Marketing in connection with a special meeting of its stockholders to consider *inter alia* a charter amendment increasing its authorized capital stock and the merger of six companies, including Interstate National Corporation ("Interstate") into Marketing.

Count Two of the indictment further charged that appellants, in attempting to reconcile net sales and earnings as originally reported in the annual report for the fiscal year ending August 31, 1968 with the amounts shown in the statement of earnings in the proxy statement, filed less than a year later, created an explanatory footnote that was materially false and misleading.² It was alleged that "as the defendants well knew but failed to disclose . . . (a) approximately one million dollars, or more than 20%, of the 1968 'net sales originally reported' had proven to be nonexistent by the time the proxy statement was filed and had been written off on [Marketing's] own internal books of account; (b) net sales and profits of 'pooled companies reflected retroactively' were substantially understated; and (c) net sales and profits of [Marketing] were substantially overstated."

² The footnote read in relevant part:

"Net sales and earnings as originally reported to stockholders in the annual report [for the year 1968] and the amounts as shown in the statement of earnings in this proxy statement are reconciled as follows:

Net sales	1968
Originally reported	\$ 4,989,416
Pooled companies reflected retroactively	6,552,449
Per statement of earnings	<u>\$11,541,865</u>
Net earnings	
Originally reported	\$ 348,031
Pooled companies reflected retroactively	385,121
Per statement of earnings	<u>\$ 733,152"</u>

Count Two charged further that the proxy statement also contained an unaudited statement of earnings for the nine months ended May 31, 1969 which was materially false and misleading in that it stated "net sales" as \$11,513,569 and "net earnings" as \$702,270, when, in fact, as the defendants well knew, "net sales" for the period were less than \$10,500,000 and Marketing had no earnings at all.

In order to understand the theory of the government's case, we must retrace our steps to the beginning of the Peat engagement at Marketing. The jury could permissibly have found the following facts.

Marketing was formed in 1966 by Cortes W. Randell. It provided to major corporate accounts a diversified range of products to the youth market a diversified range of advertising, promotional and marketing services designed to reach the youth market. In April 1968 Marketing had its first and only public offering of stock. Peat was not its auditor at the time.

Peat took on the engagement in August 1968 after checking with the previous auditors that there had been no professional disagreement with management. Natelli, the partner in charge of Peat's Washington office, undertook the engagement to audit the financial statements of Marketing for the fiscal year ended August 31, 1968, and Natelli assigned Scarsaroli to serve as supervisor on the engagement.

In late September or early October 1968 (after the close of the fiscal year), Randell and Bernard Kurck, Marketing's Comptroller, met with both appellants and discussed the method of accounting that Marketing had been using with respect to fixed-fee programs. In the fixed-fee program, Marketing would develop overall marketing programs for the client to reach the youth market by utilizing a combination of the mailings, posters and other advertis-

ing services offered by Marketing. Randell explained that Marketing and the client agreed upon a fixed fee to be charged for participating in the various programs. Randell stated that the company believed that it was proper to recognize income on these fixed-fee contracts at the time the clients committed themselves to participate in the programs presented to them by the account executives, and that this was the accounting method that had been used in preparing the financial statements for the period ended May 31, 1968, which had been distributed to stockholders.

After considering alternative methods of accounting, Natelli concluded that he would use a percentage-of-completion approach to the recognition of income on these commitments, pursuant to which the company would accrue that percentage of the gross income and related costs on a client's "commitment" that was equal to the proportion of the time spent by the account executive on the project before August 31, 1968 to the total time it was estimated he would have to spend to complete the project.

The difficulty immediately encountered was that the "commitments" had not been booked during the fiscal year, and were not in writing. The Marketing stock which had initially been sold at \$6 per share was selling in the market by September 1968 for \$80, an increase of \$74 in five months. A refusal to book the oral "commitments" would have resulted in Marketing's showing a large loss for the fiscal year—according to Kurek's computations, a loss of \$232,000.

Scansaroli, upon Natelli's order, attempted to verify the "commitments," the sales not previously included in the company records, in a rather haphazard manner by telephone to representatives of companies which had purportedly indicated some intent to use Marketing's services. Pursuant to Randell's urging, Scansaroli did not seek any

written verifications. He accepted a schedule prepared by Kurek which showed about \$1.7 million in purported "commitments." He also received from the account executives forms indicating estimates of the gross amount of the client's commitment, the printing and distribution costs to be incurred on the program, and the account executive's estimate of the percentage of completion of the program.

On the basis of the above, Natelli decided not only to recognize income on a percentage-of-completion basis, but to permit adjustment to be made on the books after the close of the fiscal year in the amount of \$1.7 million for such "unbilled accounts receivable." This adjustment turned the loss for the year into a handsome profit of \$338,031, showing an apparent doubling of the profit of the prior year.

Appellants were not charged with a criminal violation with respect to this decision. It may be observed, however, that in the footnote to the audited financial statement for 1968 explaining this method of accounting for "Contracts in Progress," no indication is given of the flimsy nature of the evidence that such client "commitments" actually existed.

After the 1968 audit had been given a full certificate by the auditors on November 14, 1968, Natelli in December 1968 told the officers of Marketing that in the future Peat would allow income to be recorded only on written commitments, supported by contemporaneous logs kept by the account executives with respect to each contract. A form letter was drafted to spell out a binding contractual commitment to be signed by each client.

In the meantime, following the issuance of the 1968 audited annual report and before the September 1969 proxy statement, seven companies were acquired largely in exchange for Marketing stock, in reliance on the 1968 annual report.

Things began to happen with respect to the \$1.7 million of "sales" that had been recorded as income after fiscal year end. Within five months of publication of the annual report, by May 1969, Marketing had written off over \$1 million of the \$1.7 million in "sales" which the auditors had permitted to be booked.

Of the total \$1 million written off, \$748,762 was attributable to "sales" purportedly made by one Ronald Michaels, an account executive who was fired for taking kickbacks and who was said to be dishonest. The other quarter of a million dollars of sales written off had nothing to do with Michaels. When accrued costs were taken into account, the effect of the write-off of the Michaels contracts was to reduce 1968 income by \$209,750. It appeared that of the \$1 million of sales requiring retroactive write-off, \$350,000 had already been written off by the company by subtracting these "sales" from 1969 *current* year figures. An additional \$678,000 was to be written off sales for the prior year 1968, and appellants were asked to design the write-off. The write-off suggested by appellants was accepted and entered in the general ledger as a journal voucher entry sometime in late April or early May.

That entry wrote off the \$678,000 retroactively as a deduction from 1968 sales. Instead of reducing 1968 earnings commensurately, however, no such reduction was made. Appellants were informed by tax accountants in Peat's employ that a certain deferred tax item should be reversed, resulting in a tax credit that happened to be approximately the same amount as the profit to be written off. Scansaroli "netted" this extraordinary item (the tax credit) with an unrelated ordinary item (the write-off of sales and profits). By this procedure he helped to conceal on the books the actual write-off of profits, further

using the device of rounding off the tax item to make it conform exactly to the write-off.³ The effect of the netting procedure was to bury the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year ended August 31, 1968.

The Proxy Statement

A. The Footnote

As part of the proxy statement, appellants set about to draft a footnote purporting to reconcile the Company's prior reported net sales and earnings from the 1968 report with restated amounts resulting from pooled companies reflected retroactively. The earnings summary in the proxy statement included companies acquired after fiscal 1968 and their pooled earnings. The footnote was the only place in the proxy statement which would have permitted an interested investor to see what Marketing's performance had been in its preceding fiscal year 1968, as retroactively adjusted, separate from the earnings and sales of the companies it had acquired in fiscal 1969.⁴

At Natelli's direction, Scansaroli subtracted the written-off Marketing sales from the 1968 sales figures for the seven later acquired pooled companies without showing

3 This procedure was approved by Natelli, for in the first printed draft of the proxy statement he prepared a footnote which lumped contract losses for 1968 and the tax adjustment, stating that "the net effect of the retroactive adjustment was a \$21,000 decrease in net earnings for the year 1968."

4 A vigilant and knowledgeable stockholder who had saved his 1968 financial report could have discovered, by matching it with the balance sheet in the proxy statement, that unbilled receivables for the year ended August 31, 1968 were now \$1,015,230 as against \$1,763,992 in the earlier document, but he would not know why there was a difference. Footnote "e" read: "Figures for 1968 have been restated in certain instances to make their presentation consistent with current accounting practices. There was no material effect as a result of such restatement."

any retroactive adjustment for Marketing's own fiscal 1968 figures. There was no disclosure in the footnote that over \$1 million of previously reported 1968 sales of Marketing had been written off. All narrative disclosure in the footnote was stricken by Natelli. This was a violation of Accounting Principles Board Opinion Number 9, which requires disclosure of prior adjustments which affect the net income of prior periods.⁵

B. The False Nine Months Earnings Statement

The proxy statement also required an unaudited statement of nine months earnings through May 31, 1969. This was prepared by the Company, with the assistance of Peat on the same percentage of completion basis as in the 1968 audited statement. A commitment from Pontiac Division of General Motors amounting to \$1,200,000 was produced two months after the end of the fiscal period. It was dated April 28, 1969.

The proxy statement was to be printed at the Pandick Press in New York on August 15, 1969. At about 3 A.M. on that day, Natelli informed Randell that the "sale" to the Pontiac Division for more than \$1 million could not be treated as a valid commitment because the letter from

⁵ Accounting Principles Board Opinion Number 9, issued December, 1966, reads in relevant part:

"26. When prior period adjustments are recorded, the resulting effects (both gross and net of applicable income tax) on the net income of prior periods should be disclosed in the annual report for the year in which the adjustments are made. [The Board recommends disclosure, in addition, in interim reports issued during that year subsequent to the date of recording the adjustments.] When financial statements for a single period only are presented, this disclosure should indicate the effects of such restatement on the balance of retained earnings at the beginning of the period and on the net income of the immediately preceding period."

APB Accounting Principles: Original Pronouncements, Vol. 2, p. 6562 (1969).

Pontiac was not a legally binding obligation. Randell responded at once that he had a "commitment from Eastern Airlines" in a somewhat comparable amount attributable to the nine months fiscal period (which had ended more than two months earlier). Kelly, a salesman for Marketing, arrived at the printing plant several hours later with a commitment letter from Eastern Airlines, dated August 14, 1969, purporting to confirm an \$820,000 commitment ostensibly entered into on May 14, just before the end of the nine-month fiscal period of September 1, 1968 through May 31, 1969. When the proxy statement was printed in final form, the Pontiac "sale" had been deleted, but the Eastern "commitment" had been inserted in its place.

Soon after the incident at Pandick Press, Douglas Oberlander, an accountant at Peat assigned by Natelli to review Marketing's accounts, discovered \$177,547 worth of "bad" contracts from 1968 which were known to Scansaroli in May, as doubtful, but which had not been written off. Oberlander suggested to Kurek that these contracts and others amounting to over \$220,000 in addition to the \$1 million in bad contracts previously disposed of, be written off. Kurek consulted Scansaroli, who, after consulting with Natelli, decided against the suggested write-off.

The proxy statement was filed with the SEC on September 30, 1969. There was no disclosure that Marketing had written off \$1 million of its 1968 sales (over 20%) and over \$2 million of the \$3.3 million in unbilled sales booked in 1968 and 1969. A true disclosure, which was not made, would have shown that without these unbilled receivables, Marketing had no profit in the first nine months of 1969.

Each appellant contends that the evidence was insufficient to support his conviction. We shall consider each appellant separately.⁶

I

Natelli—Sufficiency of Evidence

It is hard to probe the intent of a defendant. Circumstantial evidence, particularly with proof of motive, where available, is often sufficient to convince a reasonable man of criminal intent beyond a reasonable doubt. When we deal with a defendant who is a professional accountant, it is even harder, at times, to distinguish between simple errors of judgment and errors made with sufficient criminal intent to support a conviction, especially when there is no financial gain to the accountant other than his legitimate fee.

Natelli argues that there is insufficient evidence to establish that he knowingly assisted in filing a proxy statement

⁶ Natelli contends that a later incident reveals his lack of intent to deceive. In September 1969, John Johnston, a staff accountant with Peat, was assigned to prepare the audit of Marketing's books for the fiscal year ended August 31, 1969. He discovered the uncollectible contracts found by Oberlander in August and reported them to his superior, William Colona, who had replaced Scansaroli as audit supervisor when Scansaroli joined Marketing as an employee in October. Later in October, Peat was asked to prepare a "comfort letter" in connection with Marketing's acquisition of Interstate National Corporation, to assure Interstate that no adverse information concerning the unaudited statements for the period ended May 31, 1969 had been discovered since the acquisition contract had been signed in August. Colona and Johnston drafted a "comfort letter" noting adjustments which completely wiped out Marketing's first three-quarter earnings for 1969 of \$700,000 as they had been carried in the proxy statement. Natelli acquiesced. The draft "comfort letter" did not deter Interstate from closing the transaction, and Peat decided, at the suggestion of Natelli, to send the letter to the other companies being acquired, which had failed to require such a "comfort letter" in their contracts. Natelli urged this at trial as proof of his good faith, and the trial judge fairly stated to the jury his contention in that regard.

which was materially false. After searching consideration, we are constrained to find that there was sufficient evidence for his conviction.

The arguments Natelli makes in this court as evidence of his innocent intent were made to the jury and presented fairly. There is no contention that Judge Tyler improperly excluded any factual evidence offered. While there is substance to some of Natelli's factual contentions for jury consideration, we cannot find, on the totality of the evidence, that he was improperly convicted.

The original action of Natelli in permitting the booking of unbilled sales after the close of the fiscal period in an amount sufficient to convert a loss into a profit was contrary to sound accounting practice, particularly when the cost of sales based on time spent by account executives in the fiscal period was a mere guess. When the uncollectibility, and indeed, the non-existence of these large receivables was established in 1969, the revelation stood to cause Natelli severe criticism and possible liability. He had a motive, therefore, intentionally to conceal the write-offs that had to be made.

Whether or not the deferred tax item was properly converted to a tax credit, the jury had a right to infer that "netting" the extraordinary item against ordinary earnings on the books in a special journal entry was, in the circumstances, motivated by a desire to conceal.

With this background of motive, the jury could assess what Natelli did with regard to (1) the footnote and (2) the Eastern commitment and the Oberlander "bad" contracts.

A. The Footnote

Honesty should have impelled appellant to disclose in the footnote which annotated their own audited statement for

fiscal 1968 that substantial write-offs had been taken, after year end, to reflect a loss for the year. A simple desire to right the wrong that had been perpetrated on the stockholders and others by the false audited financial statement should have dictated that course. The failure to make open disclosure could hardly have been inadvertent, or a jury at least could so find, for appellants were themselves involved in determining the write-offs and their accounting treatment. The concealment of the retroactive adjustments to Marketing's 1968 year revenues and earnings could properly have been found to have been intentional for the very purpose of hiding earlier errors.⁷ There was evidence that Natelli himself changed the footnote to its final form.

That the proxy Statement did not contain a formal re-audit of fiscal 1968 is not determinative. The accountant has a duty to correct the earlier financial statement which he had audited himself and upon which he had issued his certificate, when he discovers "that the figures in the annual report were substantially false and misleading," and he has a chance to correct them. See *Fischer v. Kletz*, 266 F. Supp. 180, 183 (S.D.N.Y. 1967) (Tyler, J.). See also *Gold v. DCL Inc.*, 1973 CCH Fed. Sec. L. Rep. ¶ 94,036 at p. 94,168 (Frankel, J.). The accountant owes a duty to the public not to assert a privilege of silence until the next audited annual statement comes around in due time. Since companies were being acquired by Marketing for its shares in this period, Natelli had to know that the 1968 audited statement was being used continuously.

⁷ Natelli contends that the write-offs were of sales of Michaels, an allegedly corrupt salesman, and that since Michaels had been fired, the problem was not likely to recur. But the Government proved that at a meeting on June 9, 1969 at which Natelli was present, the Controller produced charts showing that of the \$1.5 million of 1968 sales analyzed, about \$900,000 had been written off. Of these, about \$700,000 were sales of Michaels, \$200,000 of another salesman, Ganis. (In addition, a third salesman had accounted for \$213,000 of the 1968 sales, not a dollar of which had yet been billed).

The argument that the disclosure was not material is weak, since applying write-offs only against pooled earnings, without further explanation, conceals the effect of the write-offs on the prior reported earnings of the principal company. It is the disclosure of the true operating results of Marketing for 1968, now come to light, that was material. Materiality is an objective matter, not necessarily limited by the accountant's own uncontrolled subjective estimate of materiality, see *United States v. Simon*, 425 F.2d 796, 806 (2 Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). In any event, the Court charged that the earnings figures would have to be "known to be false in a material way"—a subjective test.

B. *The Eastern Commitment and the Nine-Month Earnings Statement*

The Eastern contract was a matter for deep suspicion because it was substituted so rapidly for the Pontiac contract to which Natelli had objected, and which had, itself, been produced after the end of the fiscal period, though dated earlier. It was still another unbilled commitment produced by Marketing long after the close of the fiscal period. Its spectacular appearance, as Natelli himself noted at the time, made its replacement of the Pontiac contract "weird."⁸ The Eastern "commitment" was not only in substitution for the challenged Pontiac "commitment" but strangely close enough in amount to leave the projected earnings figures for the proxy statement relatively intact. Marketing had only time logs of a salesman relating to the making of the proposals but no record

⁸ Natelli's explanation that only the suggestion of Randell for complete replacement of the Pontiac contract without changing the figures at all, was "weird" is not convincing. Certainly the jury could find otherwise.

of expenditures on the Eastern "commitment," no record of having ever billed Eastern for services on this "sale," and not one scrap of paper from Eastern other than the suddenly-produced letter. Nevertheless, it was booked as if more than \$500,000 of it had already been earned.

Natelli contends that he had no duty to verify the Eastern "commitment" because the earnings statement within which it was included was "unaudited."

This raises the issue of the duty of the CPA in relation to an unaudited financial statement contained within a proxy statement where the figures are reviewed and to some extent supplied by the auditors. It is common ground that the auditors were "associated" with the statement and were required to object to anything they actually "knew" to be materially false. In the ordinary case involving an unaudited statement, the auditor would not be chargeable simply because he failed to discover the invalidity of booked accounts receivable, inasmuch as he had not undertaken an audit with verification. In this case, however, Natelli "knew" the history of post-period bookings and the dismal consequences later discovered. Was he under a duty in these circumstances to object or to go beyond the usual scope of an accountant's review and insist upon some independent verification? The American Institute of Certified Public Accountants, Statement of Auditing Standards No. 1—Codification of Auditing Standards and Procedures (1972), 1 CCH AICPA Professional Standards §516.00, recognizes that "if the certified public accountant concludes in the basis of facts known to him that unaudited financial statements with which he may become associated are not in conformity with generally accepted accounting principles, which in-

clude adequate disclosure, he should insist . . . upon appropriate revision . . ." (emphasis added).

We do not think this means, in terms of professional standards, that the accountant may shut his eyes in reckless disregard of his knowledge that highly suspicious figures, known to him to be suspicious, were being included in the unaudited earnings figures with which he was "associated" in the proxy statement.

The auditor's duty is not as restricted as appellants urge where, as here, the auditors, rather than the company, controlled the figures, as is evidenced by Natelli's rejection of the Pontiac contract as one he would not accept for the subsequent audited financial statement for 1969, and where the erroneous figures had previously been certified by his firm. Cf. *Fischer v. Kletz*, *supra*, 266 F. Supp. at 188, 189 (S.D.N.Y. 1967). We reject the argument of insufficiency as to Natelli, who could have pointed out the error of his previous certification and deliberately failed to do so, our function being limited to determining whether the evidence was sufficient for submission to the jury. *United States v. Simon*, *supra*, 425 F.2d at 729. We hold that it was. We discuss the objections to the charge below.

There are points in favor of Natelli, to be sure, but these were presented to the jury and rejected. These included, with their counterbalance: his rejection of the Pontiac commitment (with substitution of the Eastern contract); his discussion of the footnote with his superior, Leon Otkiss (without full disclosure to Otkiss of all relevant factors); his insistence on dissemination of the comfort letter (See note 6) that his failure to disclose the huge past write offs of Marketing resulting in no profit for 1968 or nine months of 1969).

Scansaroli—Sufficiency of Evidence

The claim of Scansaroli with respect to insufficiency of the evidence is somewhat more difficult. As Judge Tyler noted after both sides had rested, "It is a close question, I think frankly as to Scansaroli, as I see it. Certainly if I were the factfinder, I would be more troubled with his case for a variety of reasons."

Scansaroli contends that there was insufficient evidence to prove beyond a reasonable doubt that (1) he participated in a criminal act with respect to the footnote or (2) that he made an accounting judgment permitting Marketing to include in sales certain contracts-in-progress with the requisite criminal intent. We hold that there was enough evidence to establish the former, but not the latter. For reasons relating to the form of the charge, we will reverse and remand for a new trial.

A. The Footnote

The essence of Scansaroli's argument on his conviction with respect to the false footnote is that he was really convicted for his conduct during the 1968 audit, for which he was not indicted. This misses the thrust of the Government's claim. The unjustifiable manner of treating the unbilled commitments in the 1968 audit bore upon the illegal acts connected with the 1969 proxy statement in two ways: (a) it created a motive to conceal the accounting errors made in the 1968 audit; and (b) the 1968 audited statement was part of the 1969 proxy statement and was not disclosed therein to have been wrong in the light of the subsequent known write-offs. In view of the established motive to conceal, the jury could properly find, as we have seen, that both the netting of the tax credit against

earnings and the subsequent subtracting of the write-offs from the pooled earnings in the footnote without further explanation were done in order to conceal the true retroactive decrease in the Marketing earnings for fiscal 1968.

There is some merit to Scansaroli's point that he was simply carrying out the judgments of his superior Natelli. The defense of obedience to higher authority has always been troublesome. There is no sure yardstick to measure criminal responsibility except by measurement of the degree of awareness on the part of a defendant that he is participating in a criminal act, in the absence of physical coercion such as a soldier might face. Here the motivation to conceal undermines Scansaroli's argument that he was merely implementing Natelli's instructions, at least with respect to concealment of matters that were within his own ken.

We think the jury could properly have found him guilty on the specification relating to the footnote. Scansaroli himself wrote the journal entry in Marketing's books which improperly netted the tax credit with earnings, the true effect never being pointed out in the financial statement. This, with the background of Scansaroli's implication in preparation of the 1968 statement, could be found to have been motivated by intent to conceal the 1968 overstatement of earnings.

Scansaroli participated in the decision to subtract in the proxy statement footnote \$678,000 of written-off Marketing sales from the figures for later-acquired pooled companies instead of from its own figures, without further disclosure. Even if Scansaroli did not write the footnote, he supplied the misleading computations and subtractions though he was conscious of the true facts.

B. *The Eastern Commitment*

Having concluded that there was sufficient evidence to convict both appellants on the footnote specification, we turn to the nine-months earnings statement which, in turn, included two items, the Eastern contract and the doubtful commitments discovered by Oberlander. We put aside the decision to ignore Oberlander's questioning of certain commitments on the ground that, if it stood alone, the evidence would have been too equivocal to support proof beyond a reasonable doubt that this was not a mere error of judgment.

With respect to the major item, the Eastern commitment, we think Scansaroli stands in a position different from that of Natelli. Natelli was his superior. He was the man to make the judgment whether or not to object to the last-minute inclusion of a new "commitment" in the nine-month statement. There is insufficient evidence that Scansaroli engaged in any conversations about the Eastern commitment at the Pandick Press or that he was a participant with Natelli in any check on its authenticity. Since in the hierarchy of the accounting firm it was not his responsibility to decide whether to book the Eastern contract, his mere adjustment of the figures to reflect it under orders was not a matter for his discretion. As we have seen, Natelli bore a duty in the circumstances to be suspicious of the Eastern commitment and to pursue the matter further. Scansaroli may also have been suspicious, but rejection of the Eastern contract was not within his sphere of responsibility. Absent such duty, he cannot be held to have acted in reckless disregard of the facts.

III

Appellants contend that the trial court erroneously instructed the jury on the issue of knowledge. We do not agree.

The thrust of appellant's argument, as we understand it, is that the judge charged that each appellant could be convicted "if [his] failure to discover the falsity of [Marketing's] financial statements was the result of some form of gross negligence." We do not read the charge that way. It followed the charge of Judge Mansfield which was sustained in *United States v. Simon, supra*.⁹

It was a balanced charge which made it clear that negligence or mistake would be insufficient to constitute guilty knowledge. See *United States v. Bright*, — F.2d —, Slip Op. 3625 (2 Cir., May 21, 1975). Judge Tyler also carefully instructed the jury that "good faith, an honest belief in the truth of the data set forth in the footnote and entries in the proxy statement would constitute a complete defense here." On the other hand, "Congress equally could not have intended that men holding themselves out as members of these ancient professions [law and accounting] should be able to escape criminal liability on a plea of ignorance when they have shut their eyes

⁹ Judge Tyler charged, in pertinent part, as follows:

"While I have stated that negligence or mistake do not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his accounting work or whether he recklessly stated as facts matters of which he knew he was ignorant.

If you find such reckless deliberate indifference to or disregard for truth or falsity on the part of a given defendant, the law entitles you to infer therefrom that that defendant wilfully and knowingly filed or caused to be filed false financial information of a material nature with the SEC.

But such an inference, of course, must depend upon the weight and credibility extended to the evidence of reckless and indifferent conduct, if any.

I repeat: Ordinary or simple negligence or mistake alone would be insufficient to support a finding of guilty knowledge or wilfulness or intent."

to what was plainly to be seen or have represented a knowledge they knew they did not possess." *United States v. Benjamin*, 328 F.2d 854, 863 (2 Cir.) *cert. denied, sub nom. Howard v. United States*, 377 U.S. 953 (1964); and see *United States v. Brauer*, 482 F.2d 117, 128-29 (2 Cir. 1973).

One of the bases for attack on the charge is that in charging "reckless disregard for the truth or falsity" or "closing his eyes," there must also be an instruction like "and with a conscious purpose to avoid learning the truth."

It is true that we have favored this charge in false statement cases, *United States v. Sarrantos*, 455 F.2d 877, 880-82 (2 Cir. 1972), while noting that both phrases "mean essentially the same thing," *id.* at 882; and in cases involving knowledge that goods were stolen, *United States v. Brauer*, *supra*, 482 F.2d at 128-29 (2 Cir. 1973); *United States v. Jacobs*, 475 F.2d 270, 287 (2 Cir.), *cert. denied*, 414 U.S. 821 (1973). The dual instruction is not necessarily required, however, when the defendant is under a specific duty to discover the true facts, the facts tendered are suspect, and he does nothing to correct them. In *United States v. Benjamin*, *supra*, 328 F.2d at 862, this court said, regarding an accountant, that "the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see." And *United States v. Simon*, *supra*, which affirmed the conviction of an accountant, as we have seen, sustained a charge in the very language Judge Tyler tracked.

While the facts in each case are not precisely the same, we think this appeal quite analogous to *Simon*, *supra*, because Natelli was suspicious enough of the Eastern contract to check it with Kelly, the account executive in house, but not to take the next step of seeking verification from

Eastern, despite his obvious doubt that it could be booked as a true commitment. And with respect to the footnote, we think the language of this court in *Simon* to be quite pertinent, "The jury could reasonably have wondered how accountants who were really seeking to tell the truth could have constructed a footnote so well designed to conceal the shocking facts." 425 F.2d at 807.

Appellants argue strenuously, however, that *U. S. v. Simon*, *supra*, involved an audited statement while the nine months statement here involved was an unaudited statement, and, that hence, the duties of appellants here were different from those enunciated in *Simon*. They urge as a corollary that the District Court failed to instruct the jury on the difference, and that his failure to do so was reversible error.

It is true that the point on appeal might have been eliminated if the judge had charged on the differences in the abstract. But in the circumstances he was not required to do so. As we have seen, *supra*, Point I, the duty of Natelli, given this set of facts, was not so different from the duty of an accountant upon an audit as to require sharply different treatment of that duty in the charge to the jury.

We agree with Judge Tyler when he charged the jury that they could find Natelli "knew" of the falsely material fact if he acted in "reckless disregard" or deliberately closed his eyes to the obvious. The issue on this appeal is not what an auditor is *generally* under a duty to do with respect to an unaudited statement, but what these defendants had a duty to do in these unusual and highly suspicious circumstances. Cf. *United States v. Simon*, *supra*, 425 F.2d at 806-07. Nor was a proper charge requested.

The duly requested supplemental charge on Natelli's duty with respect to the unaudited earnings statement was properly denied. It read:

"The defendants' *only* responsibility as to this statement [unaudited statement of earnings for the nine months ended May 31, 1969] was to be satisfied that, *as far as they knew*, the statement contained no misstatement of material facts." (emphasis added).

This requested charge was not correct, for even on an unaudited statement with which Natelli was "associated" and where there were suspicious circumstances, his duty went further, as we have seen. As the Court correctly charged, Natelli was culpable if he acted in "reckless disregard" of the facts or if he "deliberately closed his eyes."

We expound no rule, to be sure, that an accountant in reviewing an unaudited company statement is bound, without more, to seek verification and to apply auditing procedures. We lay no extra burden on the normal activities of accountants, nor do we assume the role of an Accounting Principles Board. We deal only with such deviations as fairly come within the common understanding of dishonest conduct which jurors bring into the box as applied to the particular conduct prohibited by the particular statute.

It was not for Judge Tyler in his instructions to deal with the abstract question of an accountant's responsibility for unaudited statements, for that was not the issue. So long as we find that the Judge explicated the proper test applicable to the facts of this case, the duty inherent in the circumstances, and we do, we must also find that he gave the appellants a fair charge.

IV

The Charge on "Unanimity"

The trial judge charged as follows:

"Now, I instruct you that if you find that the proxy statement was false in either one of these two respects that is sufficient to support a conviction."

As we have seen, there were two specifications of falsity in Count II, namely, the footnote and the earnings statement. The defense requested that the court advise the jury that in order to convict, they must be unanimous on which, if either, of the two specifications had been proven materially false beyond a reasonable doubt.¹⁰ This request was refused, and the court did not charge accordingly.

Appellants now contend that the charge given left the jury free to convict if only six of them believed the proxy statement to be materially false in one respect but the other six believed the proxy statement to be materially false in the other respect. Appellants conclude that even if the evidence was sufficient to warrant the submission of each of the allegedly false statements to the jury, the conviction still cannot stand, since it cannot be determined whether the jury did in fact unanimously agree on a single specification of falsity. Appellants cite no authority directly in point. The government cites no direct authority in this circuit, but cites two cases in the Ninth Circuit, *United States v. Friedman*, 445 F.2d 1076, 1083-84, *cert. denied*, *sub nom. United States v. Jacobs*, 404 U.S. 958 (1971) and *Vitello v. United States*, *supra*, 425 F.2d at 422-23, as directly in point. However, these cases are distinguishable.

¹⁰ This was not a request for a special verdict. Cf. *United States v. Spock*, 416 F.2d 165, 180-83 (1 Cir. 1969); and see *U.S. v. Adcock*, 447 F.2d 1137 (2 Cir. 1971).

In *Friedman*, the indictment alleged a conspiracy to violate several substantive statutes. The jury found appellants guilty of the conspiracy and of acts charged in particular substantive counts, thus indicating which violations in the conspiracy count the jury had found unanimously.

Vitello turned largely on the failure of counsel to object at trial. The court noted, however, that it would have had to follow *Yates v. United States*, 354 U.S. 298, 311-12 (1957) if "there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity". 425 F.2d at 419.

The charge given by Judge Tyler is a charge generally given in this circuit. It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict. We do not say it would be wrong for a trial judge to give the charge requested, but it is not error to refuse it.¹¹ And we do not change that rule.

The court properly charged that the jury needed only to find a defendant guilty on either of the two specifications in order to convict. Inasmuch as the evidence was sufficient to support Natelli's conviction on either specifi-

11 In reaching this result, we believe that we are following *United States v. Remington*, 191 F.2d 246, 250 (2 Cir. 1951) (L. Hand, A. Hand & Swan, JJ.). There the defendant was convicted of perjury in falsely testifying before the Grand Jury that he had never been a member of the Communist Party. He had requested a charge that "all jurors must be convinced that the accused was a member of the Party 'at a particular time and place,' and if some thought he was at one time only and some another, they could not convict him." Judge Swan agreed that "that request was right and should be given if there is a new trial" but he refused to label it reversible error to refuse the charge "since the substance of it was probably covered, though not so explicitly, by the charge that the jury must be unanimous."

cation, the charge given presents no problem to affirmance as to him.

A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial. That is the general principle. *Yates v. United States*, *supra*; *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). See *United States v. Jacobs*, *supra*, 475 F.2d at 283 and cases cited therein.

It is true, of course, that sometimes, as in conspiracy to violate two different substantive statutes, the same evidence may support conviction of conspiracy to violate either or both. See e.g., *Jacobs*, *supra*, 475 F.2d at 283-84.

When there is more than one specification as a predicate for guilt, each dependent on particular evidence which is unrelated to the other, it would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict. Since that was not done here and since we have found that Scansaroli was not culpable on the earnings statement specification, the essence of which was the inclusion of the Eastern commitment, we must reverse his conviction and remand for trial on the footnote specification alone. We realize that we are reversing a conviction involving only 10 days of jail time. Whether it is important enough for the United States to retry him in the circumstances is a matter for decision by the United States Attorney on which we cannot pass judgment.

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Appellants contend that Count II of the indictment should be dismissed for lack of proper venue. Prior to trial, appellants had jointly moved to dismiss Count II on the ground that proper venue lay only where the proxy statement had been filed with the Securities and Exchange Commission, the District of Columbia. The trial court denied the motion. We must consider the issue with the recognition that venue in criminal cases may raise "deep issues of public policy". See *United States v. Johnson*, 323 U.S. 273, 276 (1944).

Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, provides that criminal proceedings for violations of the Act are to be brought in a district where "any act or transaction constituting the violation occurred." Appellants contend that the only critical act here was the filing of the proxy statement containing the false statements in the District of Columbia where it was delivered to the Commission, which is also where appellants' and Marketing's principal offices were. The government contends that there is venue for a charge of violation of section 32 of the 1934 Act, 15 U.S.C. § 78ff,¹² in the Southern District of New York as well. The government asserts that it has proved that the false footnote and the false nine months earnings statement were prepared in Manhattan, and that this suffices.¹³

In denying the pre-trial motion, the District Court held that the gravamen of the violation under Section 32 was the making of the false statement, not the filing, the words of the statute "required to be filed" merely describing a category of documents rather than the essence of the of-

¹² See note 1, *supra*.

¹³ Appellants do not seriously contend that there was no preparation in the Southern District as a matter of fact.

fense. The government, in support, notes the general venue provision for continuing offenses.¹⁴

Appellants retort that Section 27 of the 1934 Act stands apart from the continuing offense statute, arguing that it comes within the exception used when Congress has specifically provided for alternate venue. Appellants find support in *Travis v. United States*, 364 U.S. 631 (1961) which held that the proper venue for an offense under 18 U.S.C. § 1001, the False Statements Act, was not the district in which the false statement was made, but only the district where the affidavit had to be filed, the District of Columbia. The rationale of the decision, as we read it, was that section 1001 proscribes false statements "in any matters within the jurisdiction of any department or agency of the United States" and that the National Labor Relations Board had no such "jurisdiction" under Section 9(h) of the National Labor Relations Act as amended,¹⁵ until the non-Communist affidavit required by the statute as a precondition to N.L.R.B. investigation was actually filed in Washington, D.C.¹⁶

The majority opinion in *Travis* was careful to note that "[t]he decisions are discrete, each looking to the nature of the crime charged." 364 U.S. at 635. And this court has

¹⁴ 18 U.S.C. § 3237(a) reads:

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

¹⁵ 61 Stat. 136, 146, amended, § 1(d), 65 Stat. 601, 602, repealed, § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

¹⁶ If the "jurisdiction of the agency" exists where the false statement is made, however, the continuing offense statute is applicable to venue even in section 1001 cases. *United States v. Candella*, 487 F.2d 1223 (2 Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

annotated *Travis* by stating that "the decision surely was meant to be confined to the facts based on the unusual statute involved." See *United States v. Slutsky*, 487 F.2d 832, 839 n.8 (2 Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). See also *United States v. Ruchrup*, 333 F.2d 641, 643 (7 Cir.), *cert. denied*, 379 U.S. 903 (1964); *Imperial Meat Co. v. United States*, 316 F.2d 435, 440 (10 Cir.), *cert. denied*, 375 U.S. 820 (1963).

Appellant seeks to come within the *Travis* holding by arguing that just as in *Travis* where the filing of the non-Communist affidavit was simply a prerequisite to future conduct, resort to NLRB processes, so the filing of a proxy statement is merely the prerequisite to future conduct, the solicitation of proxies. The argument is unsound.

In *Travis*, the labor board had no jurisdiction to make an investigation of labor practices "unless there is on file with the Board" a non-Communist affidavit. Here the filing of the proxy statement is part of the continuous process of the solicitation of proxies. Proxy statements are filed only at such time as the persons filing require proxies for some corporate purpose.¹⁷ The filing and solicitations are part of the same process. We hold that there was venue in the Southern District of New York.

We have considered the other arguments raised by appellants and find them without merit. Judgment affirmed as to appellant Natelli; as to appellant Scansaroli judgment reversed and remanded for a new trial.

¹⁷ We may note, that paradoxically, in most cases arising under the 1934 Act, the defendants would presumably contend that they wished to be tried in their home districts rather than in the District of Columbia. Here the appellants happen to live and work in the District of Columbia and have been tried elsewhere, a rather unusual situation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1035 & 1036—September Term, 1974.

(Decided October 6, 1975.)

Docket Nos. 73-1004, 73-1008

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

Before:

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

ON PETITION FOR REHEARING BY UNITED STATES

GURFEIN, *Circuit Judge:*

The United States petitions for rehearing of that portion of our decision, filed July 28, 1975, slip op. 5165, which reversed the conviction of Scansaroli and remanded for a new trial as to him.

Natelli and Scansaroli were tried and convicted on a single count of wilfully making and causing to be made false and misleading material statements in a proxy state-

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ment. The single count specified two false statements: the "footnote" and the "nine-months earnings statement." This court found sufficient evidence on each specification to sustain Natelli's conviction but held as to Scansaroli that there was insufficient evidence to go to the jury on the second specification. On that basis, we concluded that as to Scansaroli the jury might have convicted only on the specification held to be insufficiently proved. Slip op. at 5191. We accordingly remanded for a new trial.

The government calls our attention to cases in this circuit which have held that a general motion to dismiss a count with several specifications is insufficient to preserve on appeal the point that where one of the specifications is insufficiently proved the conviction on the entire count must be reversed. These cases hold that, to preserve the point on appeal, a specific motion must be made in the trial court to withdraw the particular specification from jury consideration. *United States v. Mascuch*, 111 F.2d 602, 603 (2 Cir.), cert. denied, 311 U.S. 650 (1940); *United States v. Goldstein*, 168 F.2d 666, 671 (2 Cir. 1948).

No separate motion was made by Scansaroli to withdraw the earnings statement specification from consideration by the jury. He did move to strike evidence concerning the Eastern Airlines affair and also asked for an instruction that the jury had to be unanimous on each specification, but he did not move to dismiss the specification for insufficiency. The failure to move may have been dictated by tactical considerations on the theory of his able counsel that it is easier to attack a weak specification in the hope of a spillover to the stronger one. Be that as it may, we feel bound to follow the *Mascuch-Goldstein* rule, particularly in view of its eminent authorship.

Accordingly, we are constrained to grant the government's petition for rehearing, and, upon rehearing, we

withdraw our former determination and affirm the conviction of Scansaroli as well as Natelli.

We might suggest that in view of the turn Scansaroli's case has taken and the short sentence he received from Judge Tyler, the District Judge who inherits the case ought carefully to consider a Rule 35 application to suspend the 10 days of jail time imposed.

If
APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Nos. 1035 & 1036—September Term, 1975.

(Decided December 4, 1975.)

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee.

v.

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

Before :

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

On SCANSAROLI's Petition for Rehearing

GURFEIN, Circuit Judge:

This matter comes before the panel again on Scansaroli's petition for rehearing pursuant to our grant of permission. On the original appeal we had reversed appellant's conviction and remanded for a new trial.¹

The single count charging violation of 15 U.S.C. § 78ff(a) upon which he was convicted involved the making of a

¹ This opinion assumes knowledge of our original opinion, — F.2d —, Slip Op. 5165 (July 28, 1975).

false proxy statement which specified two false items therein: the "footnote" and the "nine-months earnings statement." We held that there was insufficient evidence to convict Scansaroli on the latter specification. See main opinion, Docket Nos. 75-1004, 75-1008, slip op. 5165, 5184, decided July 28, 1975.

We then granted a rehearing on the government's petition and held that under an old doctrine in this circuit we were constrained to decide that the failure of appellant specifically to ask the trial court to withdraw one of two specifications in a single count on the ground that it was insufficiently proved precluded appellate consideration. *United States v. Mascuch*, 111 F.2d 602, 603 (2 Cir.), cert. denied, 311 U.S. 650 (1940); *United States v. Goldstein*, 168 F.2d 666, 671 (2 Cir. 1948).

We accordingly reversed ourselves on the decision to grant a new trial to Scansaroli. We now withdraw our opinion on rehearing and reconsider this difficult question of appealability *de novo*.

We start with the proposition that there are many criminal cases where the failure to object has resulted in affirmance under Rule 30 as applied in Rule 52(a). Appellant's rather strident cries that our decision against him is unprecedented is hardly impressive. Many convictions are denied appellate review for failure to call the alleged error to the attention of the trial court so as to enable it to consider correction before verdict. Otherwise appellate review would become a game of hindsight.

I

We recognize, nevertheless, that even under the *Mascuch-Goldstein* line of cases, a proper request to the trial court would save the point. See, e.g., *United States v. Adcock*, 447 F.2d 1337, 1338-39 (2 Cir.), cert. denied, 404 U.S. 939

(1971);² *United States v. Pollak*, 474 F.2d 828 (2 Cir. 1973). And see also *Warszower v. United States*, 312 U.S. 342, 345 (1941).³ As we indicated in our original opinion, that is because *Yates v. United States*, 354 U.S. 298, 311-12 (1957),⁴ and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), can be read as covering the situation where a jury may have convicted on the very specification which is insufficiently proved to make out an offense.

That is true, especially, when the specifications in the single count relate to two distinct incidents or fact patterns, see *United States v. Ginterma*, 281 F.2d 742, 747 (2 Cir.), cert. denied, 364 U.S. 871 (1960), rather than being merely a charge of alternate ways of violating a statute stated in the conjunctive. Cf. *United States v. Astolas*, 487 F.2d 275, 280 (2 Cir. 1973), cert. denied, 416 U.S. 955 (1974).

Assuming, as we have already in our original opinion, that reversal of the conviction of Scansaroli is required if counsel adequately raised the point below, we turn to the question of how much must be done by defense counsel to protect the record.

2 In *Adcock*, we reversed a conviction which charged the making of a false statement in violation of 18 U.S.C. § 1001 where the count ultimately reversed contained three assignments of falsity, two of which were sufficiently supported by the evidence. The government conceded on appeal that a proper motion to strike had been made pursuant to the *Mascuch-Goldstein* rule, but argued that appellant should, in addition, have moved for a special verdict. We held in *Adcock* that a special verdict would have been improper and hence a motion for such a verdict was unnecessary.

3 There the defendant had moved to strike from the record or exclude from the consideration of the jury each of the four alleged false statements.

4 In *Yates* it is not clear what protective measures appellant had taken below. The Court of Appeals had noted that many motions had been made. 225 F.2d 146, 149 (9 Cir. 1955).

The Federal Rules of Criminal Procedure cast no light on the matter. Rule 29(a) simply provides for a motion for judgment of acquittal "of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." No provision is made for a motion to withdraw one of two specifications in a single count on the ground of insufficiency. There may be an implication in Rule 30 that the failure to object to a particular specification is fatal because it amounts to a failure to object to an "omission" from the charge, but that is not clear. Finally, there is nothing in Rule 32(b) that tells us that the failure of the trial court to withdraw the particular specification *without request* is "plain error."

III

We must also consider the matter in practical terms, not only from the point of view of the particular defendant, but also in consideration of the requirements of the criminal justice process. Rule 7(c)(1) provides that "[i]t may be alleged in a single count that . . . he [the defendant] committed it [the offense] by one or more specified means." The government treats the separate incidents of "the footnote" and the "nine-months statement" as specified means for committing the single crime. See original opinion, slip op. at 5167-69. And no one doubts that for pleading purposes the prosecution is right.

The government has argued from this that if our original ruling stands, it would compel the government in any false statement case, simply out of caution, to allege each incident constituting the "means" of committing the offense in a *separate count* or risk the reversal of a conviction

based on afterthoughts on appellate review. We believe that this might be the better practice in cases like this where the incident charged as in violation of a statute are discrete. On the other hand, when that is not done, appellate review is not generally available when the particular insufficiency has not in some way been called to the attention of the trial judge. We do not believe that *Yates, supra*, in spite of its broad language, dictates a contrary result. Cf. *Turner v. United States*, 396 U.S. 398, 420 & n. 42 (1970).

What prompts our present consideration of Scansaroli's petition for rehearing is his argument that he did make it sufficiently clear to the trial judge that he wanted a judgment of acquittal or some equivalent on the "nine-months earnings statement" specification. On reconsideration, we agree that the arguments of counsel for Scansaroli with respect to the sufficiency of the evidence, his motion to strike the evidence relating to the Eastern commitment (an essential part of the "nine-months earnings statement" specification) and the *co-defendant's* specific motion to withdraw the specification on the nine-months earnings statement make this a close question.⁵ Cf. *United States v. Lefkowitz*, 284 F.2d 310, 313 n.1 (2 Cir. 1960). As the Supreme Court has recently intimated in *Anderson v. United States*, 417 U.S. 211, 223 n.12 (1974), we may, in our discretion, consider a "sufficiency-of-the-evidence claim" even though the question arose below "only with respect to the admissibility of [certain] testimony." While *Anderson* also involved the question of whether the particular statute was *unconstitutionally* vague, and all the cases cited by Mr. Justice Marshall

⁵ We recognize that we cannot find fault with the distinguished District Judge, Harold Tyler, for not recognizing the various motions as a single request. We treat them, however, as sufficient to permit review in the interests of justice.

involved similar *constitutional* questions, we have concluded that we have sufficient discretion to adopt the reasoning in *Anderson* on this appeal.

Accordingly, we do not purport to lay down a firm rule to govern the precise action required below for appealability where a single count contains more than one specification. Indeed, we could hardly do so without the empanneling of an *en banc* court. We decide simply, on further consideration, that appellant in this case did enough below to satisfy the spirit of the *Mascuch-Goldstein* rule. We accordingly withdraw our opinion on the government's petition and reinstate our original opinion as to Scansaroli in all respects. Cf. *United States v. Love*, 472 F.2d 490, 496 (5 Cir. 1973).

APPENDIX G

1. Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, provides in pertinent part:

(a) Any person who . . . willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

2. Section 2255 of Title 28 of the United States Code provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and

conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * *